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# IN THE COURT OF APPEALS OF INDIANA

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| JAMES A. SHAMP, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 79A05-0702-CR-100 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald Johnson, Judge
Cause No. 79D01-0509-FB-56

**September 4, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issues

Following a guilty plea, James A. Shamp appeals his fourteen-year sentence. Shamp raises one issue, which we expand and restate as: (1) whether the trial court abused its discretion in finding the aggravating and mitigating circumstances; and (2) whether Shamp's sentence is inappropriate. Although we conclude that the trial court did not abuse its discretion, we reverse, concluding that Shamp's sentence is inappropriate.

## Facts and Procedural History

In September of 2005, Lafayette Police Department Detectives McCoy and Rosen began investigating Shamp, who was sixty years old at the time, after one of Shamp's neighbors made a complaint to the police. Specifically, Shamp's neighbor was concerned because she was aware Shamp was a registered sex offender and had heard that Shamp kept a "loaded shotgun" in his house.[1] Transcript at 20. Shamp's neighbor also communicated that other neighbors of Shamp were worried because they had noticed younger kids going into Shamp's house, one of whom was "a little slow." Brief of Appellee at 5. However, an investigation carried out by Detectives McCoy and Rosen did not reveal any evidence of child molesting.

On September 23, 2005, Detectives McCoy and Rosen arrived at Shamp's house to obtain Shamp's consent to search his home. Shamp was the only person in the house at the time. Shamp gave his consent, and shortly thereafter, Detectives McCoy and Rosen found a

[1] Although Detective McCoy testified that he believed the report he received indicated Shamp's neighbor actually saw the shotgun, the report he received via e-mail stated the neighbor had only "heard" about Shamp's possession of the shotgun from other individuals. State's Exhibit 9.

loaded handgun in the top drawer of a dresser. Shamp had apparently purchased the handgun at a local antiques shop. Shamp also told Detectives McCoy and Rosen he had bought two shotguns at a garage sale for his sons and told the officers "his boys [were] hunters." Id. at 23. Detectives McCoy and Rosen did not find the two shotguns inside Shamp's house, and Shamp explained that his son had removed them two weeks ago. Shamp was arrested that same day.

On September 26, 2005, Shamp was charged with possession of a firearm by a serious violent felon, a Class B felony, for which the minimum sentence is six years, the maximum sentence is twenty years, and the advisory sentence is ten years. See Ind. Code § 35-50-2-5. The underlying offense to establish Shamp's serious violent felon status was his child molesting conviction from 1984. On March 10, 2006, Shamp pled guilty pursuant to a plea agreement providing for a sentence cap of fourteen years.

During the sentencing hearing, Lafayette Police Department Detective Huff testified the handgun was made before 1968, when the federal government started requiring firearms to have serial numbers. The handgun did not have any markings on it, but Detective Huff testified the manufacturer of the handgun was "probably from about the 1900[sic]." Id. at 25. The two shotguns were also made before 1968, but these two guns did not have "inherent collectors' value." Id. at 26. The trial court asked Shamp about his reasons for having the handgun, and Shamp said he was in habit of collecting "antique stuff" and stated he was just "being stupid." Id. at 18-19.

On April 28, 2006, the trial court held a sentencing hearing at which it found Shamp's criminal history to be an aggravating circumstance and found his military service to be a mitigating circumstance.[2] The trial court then sentenced Shamp to fourteen years, eleven years executed at the Department of Correction, and three years executed at Tippecanoe County Community Corrections. Shamp now appeals his sentence.

Discussion and Decision

Shamp does not explicitly argue the trial court abused its discretion in sentencing him to fourteen years. However, Shamp suggests the trial court abused its discretion by overlooking three mitigating factors, including: (a) his guilty plea; (b) his age at the time of the sentencing hearing; and (c) the fact that he did not use or display the handgun, or endanger any person with it. Shamp further argues his sentence is inappropriate.

I. Abuse of Discretion

Sentencing decisions are reviewed on appeal for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). An abuse of discretion occurs when the decision is "'clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom'." K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006) (quoting In re L.J.M., 473 N.E.2d 637, 640 (Ind. Ct. App. 1985).

Shamp's offense was committed after April 25, 2005, when the legislature replaced presumptive sentences with advisory sentences. See Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Thus, the trial court may order any sentence authorized

[2] The written sentencing statement does not identify Shamp's military service as a mitigating

by statute and permissible under the Indiana Constitution. Ind. Code § 35-38-1-7.1(d). However, trial courts still must enter sentencing statements whenever sentencing defendants convicted of felonies. Anglemyer, 868 N.E.2d at 490. "Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, unlike the pre- Blakely statutory regime, a trial court can not now be said to have abused its discretion in failing to 'properly weigh' such factors." Id.

However, the trial court may abuse its discretion by entering a sentencing statement "that explains reasons for imposing a sentence-including a finding of aggravating and mitigating factors if any-but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration." Id. at 490-91. Shamp suggests the trial court abused its discretion by omitting certain mitigating circumstances.

Here, the sentencing statement indicates the "aggravating factors outweigh[ed] the mitigating factors." Appellant's Appendix at 45. The sentencing statement also indicates the trial court found Shamp's criminal history to be an aggravating circumstance, but it does not mention any other aggravating or mitigating circumstances. However, "we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings." Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002). The transcript of the sentencing hearing reveals that the only other factor the trial court appears to have considered was Shamp's military service. The trial court stated, "you've got a criminal

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circumstance.

history, which is a, the Court considers an aggravator. But on the other hand, you've served your country and received an honorable discharge and the Court puts that on the mitigators side." Tr. at 17.

We observe that Shamp does not challenge the propriety of his criminal history as an aggravating circumstance. Instead, Shamp argues the trial court overlooked three mitigating factors: his guilty plea, his age of sixty years at the time of sentencing, and the fact that he did not show or display the handgun, or endanger any person with it. "[T]he trial court does not abuse its discretion in failing to consider a mitigating factor that was not raised at sentencing." Anglemyer, 868 N.E.2d at 492; See also Georgopulos v. State, 735 N.E.2d 1138, 1145 (Ind. 2000). In this case, Shamp did not offer his age to the trial court for consideration as a mitigating circumstance at the sentencing hearing. Shamp is, therefore, precluded from arguing on appeal that the trial court abused its discretion in failing to find this mitigating circumstance. See Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied.

Shamp did raise at his sentencing hearing that "there's no evidence the [guns] were brandished in any way or pulled out." Tr. at 32. A trial court may consider as a mitigating circumstance that "[t]he crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so." Ind. Code § 35-38-1-7.1(b)(1). However, by enacting Indiana Code section 35-47-4-5, our legislature has indicated its belief that the mere possession of a gun by a violent felon is a threat to society. See Baker v. State, 747 N.E.2d 633, 638 (Ind. Ct. App. 2001), trans. denied (concluding that

the statute does not violate equal protection principles because it is "reasonable for the legislature to assume that violent felons would pose a higher risk of endangering the public with a firearm than the class of exempted non-violent offenders"). We conclude that the trial court did not abuse its discretion in omitting this mitigating circumstance, as the record does not clearly demonstrate that Shamp's possession of a firearm did not constitute a threat of serious harm to other individuals.

Also, although Shamp did not specifically argue at sentencing that his guilty plea should be a mitigating circumstance, we have previously noted that trial courts are "inherently aware" when defendants have pled guilty, and that the failure to mention the plea at a sentencing hearing does not waive the issue. See Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied. In general, a guilty plea is considered a mitigating circumstance. See id. However, when a defendant receives a benefit as a result of his or her guilty plea, the plea may be regarded as more of a pragmatic decision and less of an acceptance of responsibility for one's actions. See Wells, 836 N.E.2d at 479. In addition, when significant admissible evidence exists of a defendant's guilt, the significance of a guilty plea is reduced. See Scott, 840 N.E.2d at 383. Because of the benefit of a capped sentence and the amount of evidence against Shamp, we conclude that the record did not clearly demonstrate that Shamp's guilty plea was a reason that should influence the trial court's sentencing decision, and therefore, the trial court's failure to identify it in its sentencing did not amount to an abuse of discretion.

## II. Appropriateness of the Sentence

Shamp further argues his fourteen-year sentence is inappropriate under Indiana Appellate Rule 7(B). Although the trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize "independent appellate review and revision of a sentence imposed by the trial court." Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006) (quoting Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002)). This appellate authority is implemented by means of Indiana Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." When making this analysis, we recognize that the advisory sentence is the starting point the legislature has selected as an appropriate sentence for the crime committed. See Wiess v. State, 848 N.E.2d 1070, 1072 (Ind. 2006).[3]

Regarding Shamp's character, the trial court noted Shamp's criminal history, referring to his convictions for child molesting and confinement in 1984. The trial court, however, did not consider that Shamp had been fairly law-abiding from 1993-when he was released from prison-until 2005-when he was arrested for the current offense. During these twelve years, Shamp had been convicted only of a Class C misdemeanor for operating a vehicle without insurance in 1997. Shamp was also registered as a sex offender the entire time. Furthermore,

[3] Shamp asserts he received the "maximum" sentence. Maximum sentences are normally reserved for the "worst" offenses and offenders. See Buchanan, 767 N.E.2d at 973. Shamp seems to claim the fourteen-year cap in his plea agreement is the "maximum" sentence, rather than the statutory twenty-year maximum sentence, for purposes of a "worst" offense and offender analysis. However, he does not cite any authority for this claim. We will analyze the appropriateness of Shamp's sentence with reference to the statutory maximum for a Class B felony, not the cap in his plea agreement.

the trial court did not take into account that the current conviction was unrelated to his 1984 and 1997 convictions. See Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004) ("Significance varies based on the gravity, nature and number of prior offenses as they relate to the current offense" (quoting Wooley v. State, 716 N.E.2d 919, 929 (Ind. 1999))).

In considering his character, Shamp argues the trial court should have given more consideration to his plea. Although, as discussed previously, the trial court did not abuse its discretion in failing to find Shamp's plea to be a significant mitigating circumstance, the plea still comments positively on Shamp's character. However, "the extent to which a guilty plea is mitigating will vary from case to case." Hope v. State, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005). Although Shamp received a benefit and substantial evidence existed of his guilt, the guilty plea was accompanied by an acceptance of responsibility, as during the sentencing hearing Shamp stated, "I was being stupid," Tr. at 18-19, and did not try to rationalize or blame others for his act. See Hope, 834 N.E.2d at 718 ("[The defendant's] guilty plea and acceptance of responsibility at least partially confirms other mitigating evidence regarding his character"). Additionally, Shamp cooperated fully with police in this case, allowing them to search his home and informing them about additional weapons. See Edgecomb v. State, 673 N.E.2d 1185, 1199 (Ind. 1996).

As for the nature of the offense, it did not appear to be heinous. Although Shamp's neighbor alleged that Shamp had possibly had children in his home, Detectives McCoy and Rosen did not uncover any evidence of child molesting during their investigation of Shamp. Moreover, the State did not present evidence of child molesting, and Shamp was never

charged with anything other than possession of a firearm by a serious violent felon. When Detectives McCoy and Rosen arrived at his home to conduct a search, Shamp voluntarily gave his consent, and he was only found in possession of the handgun. The handgun was found to be loaded, but it was dangerous to fire because of some "mechanical issues" with the gun. Tr. at 28. No evidence was introduced that Shamp ever used or displayed this gun. Shamp was honest in informing Detectives McCoy and Rosen that he had purchased two other guns at a garage sale, both of which were shotguns, and told them these guns were not in his house because his son had removed them two weeks prior to the search.

Taking the above into consideration, we conclude that Shamp's fourteen-year sentence is inappropriate in light of the nature of his offense and his character, and that the ten year advisory sentence for Shamp's crime is appropriate.

## Conclusion

We conclude the trial court did not abuse its discretion in finding the aggravating and mitigating circumstances. However, Shamp's fourteen-year sentence was inappropriate in light of his character and the nature of the offense, and we therefore order his sentence reduced to ten years.

Reversed and remanded.

SULLIVAN, Sr. J., and VAIDIK, J., concur.